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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re

KENNETH ROBERT CIZEK,

On Habeas Corpus.

F064008

(Tulare Co. Sup. Ct. Nos. VCF249671 &
PCF203272)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Brett Allredge,
Judge.

Kenneth Robert Cizek in pro. per., for Petitioner.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney
General, Kathleen A. McKenna and Tiffany J. Gates, Deputy Attorneys General, for
Respondent.

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* Cornell, A.P.J., Poochigian, J., and Detjen, J.

Petitioner seeks leave to file a belated notice of appeal.

On May 16, 2011, petitioner entered a plea of nolo contendere to one count of assault by means likely to produce great bodily injury (Pen. Code § 245, subd. (a)(1)) and one count of second degree burglary (Pen. Code § 459). Petitioner also admitted the truth of the allegation that, during the commission of the assault, he personally inflicted great bodily injury on someone other than an accomplice (Pen. Code § 12022.7, subd. (a)). On August 23, 2011, the court sentenced petitioner to state prison for a total term of five years.

Petitioner asserts that he asked counsel to file a timely notice of appeal on his behalf, but that counsel failed to do so.

On December 9, 2011, petitioner attempted to file a notice of appeal.

On December 22, 2011, the Tulare County Superior Court issued a letter informing petitioner that his notice of appeal was received, but not filed, as it was untimely.

The instant petition followed.

By an order filed on March 2, 2012, this court granted the Attorney General leave to file an informal response to the merits of the petition. On March 29, 2012, the Attorney General filed a response stating that “because petitioner’s trial counsel informed petitioner that he would timely file a notice of appeal then failed to do so, and petitioner was diligent in pursuing his appellate rights, petitioner’s notice of appeal should be deemed constructively filed within the 60-day period”

DISCUSSION

A notice of appeal and a statement in support of a certificate of probable cause must be filed within 60 days of the date of the rendition of the judgment. (Penal Code § 1237.5; Cal. Rules of Court, rules 8.304, 8.308.) Although a criminal defendant has the

burden of timely filing a notice of appeal, the burden may be delegated to trial counsel. (*In re Fountain* (1977) 74 Cal.App.3d 715, 719.) “A criminal defendant seeking relief from his default in failing to file a timely notice of appeal is entitled to such relief, absent waiver or estoppel due to delay, if he made a timely request of his trial attorney to file a notice of appeal, thereby placing the attorney under a duty to file it, instruct the defendant how to file it, or secure other counsel for him [citation]; or if the attorney made a timely promise to file a notice of appeal, thereby invoking reasonable reliance on the part of the defendant [citation].” (*People v. Sanchez* (1969) 1 Cal.3d 496, 500.)

DISPOSITION

Petitioner is entitled to relief. Petitioner is granted leave to file a request for a certificate of probable cause and a notice of appeal to be filed on or before May 15, 2012, in Tulare County Superior Court Nos. VCF249671 and PCF203272. Let a writ of habeas corpus issue directing the Tulare County Superior Court, if it receives the request and the notice of appeal on or before May 15, 2012, to file the request and the notice of appeal, to treat the request and the notice of appeal as being timely filed, and to process the request and the appeal in accordance with the applicable rules of the California Rules of Court.